United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

77-7055

To be argued by
RICHARD L. BOND

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RANDOLPH PHILLIPS,

Plaintiff-Appellant,

—v.—

INVESTORS DIVERSIFIED SERVICES, INC. and
ALLEGHANY CORPORATION,

Defendants-Appellees.

APPEAL FROM THE ORDERS AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 72-1544

BRIEF FOR APPELLEES

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STATEMENT OF THE ISSUES

Appellant's statement of the issues presented for review is so incomplete and presented in such conclusory form that it is impossible to determine what questions are before the Court. The issues are as follows:

A. With Respect to Defendant-Appellee Alleghany Corporation

1. Did the District Court have jurisdiction to correct a clerical error resulting in entry of a default judgment prior to the docketing of the appeal from that judgment, which appeal, in any event, was jurisdictionally defective? [Appellant does not contend that the District Court determination was in error.]

2. Did Alleghany Corporation waive its objections to the clerical error that had resulted in entry of a default judgment by moving in the District Court, after the District Court had vacated the default judgment and prior to the docketing of its appeal, to voluntarily dismiss the appeal pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure and by the granting of that motion?

3. Did the District Court correctly dismiss Alleghany Corporation for lack of subject matter jurisdiction where no basis for jurisdiction upon Alleghany Corporation was alleged by appellant?

4. Is appellant barred from pursuing the claims against Alleghany Corporation by his stipulation dismissing these claims, executed by him and "so ordered" by the District Court more than two years after the District Court decisions from which he seeks to appeal herein? [A motion by Alleghany Corporation to dismiss the appeal against it on this ground, was referred to this panel by the panel that heard the motion.]

B. With Respect to Defendant-Appellee Investors Diversified Services, Inc.

5. Did the District Court correctly dismiss the amended complaint on the grounds that:

(a) Appellant's claim for statutory indemnification of counsel fees in defending derivative litigation was his exclusive remedy, and there is no common law right to such indemnification.

(b) Appellant does not state a claim for statutory indemnification because he incurred no counsel fees and because he is not an attorney.

(c) Appellant's claim for statutory indemnification is barred by the six year limitations period then applicable to causes of action created by statute.

(d) Denial of Appellant's claim does not violate his Constitutional rights.

C. With Respect to Counsel for Defendants-Appellees

6. Did the District Court correctly refuse to disqualify counsel for defendants-appellees in the absence of any allegations of conflict or prior representation of appellant?

STATEMENT OF THE CASE

This action seeks recovery from defendants-appellees Alleghany Corporation ("Alleghany") and Investors Diversified Services, Inc. ("IDS"), on a variety of theories, for time spent by plaintiff-appellant Randolph Phillips ("Phillips") - who is not a lawyer - in his pro se defense in the District Court in Alleghany Corporation v. Kirby, 218 F.Supp. 164 (S.D.N.Y. 1963), aff'd, 333 F.2d 327 (2d Cir. 1964), aff'd en banc, 340 F.2d 311 (2d Cir. 1965), cert. granted, 381 U.S. 933 (1965), cert. dismissed, 384 U.S. 28 (1966), rehearing denied, 384 U.S. 967 (1966) (hereinafter "Alleghany v. Kirby").

Appeal to this Court follows five years of motion practice resulting in the dismissal of Phillips' claims against Alleghany for lack of subject matter jurisdiction and the granting of summary judgment in favor of IDS on all of Phillips' claims.

The unconscionable length of time that it has taken to finally dispose of these motions, each initially made by Alleghany and IDS in 1972 in lieu of answering, resulted from Phillips' determined effort to protect an improper default judgment against Alleghany secured as a result of undisputed clerical error and from Phillips' repeated attempts over the years to reach this Court by improper interlocutory appeals.

Nature of Phillips' Claims

The original complaint (7a[1] - 12a) was filed by Phillips in the United States District Court for the Southern District of New York on April 14, 1972,

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1. Page references followed by the letter "a" are to the Joint Appendix.

and contains one count alleging in narrative form the following facts:

1. The citizenship of Phillips and IDS and a claim of "inherent jurisdiction" over Alleghany because it was a party to Alleghany v. Kirby. (7a)

2. The procedural history of Alleghany v. Kirby, which was commenced derivatively and later prosecuted by the corporation (7a - 8a), and two related derivative actions.[2]

3. At the time of institution of the derivative actions, Phillips was a director of IDS, an Alleghany subsidiary, "serving upon the nomination of defendant Alleghany corporation" and was sued in his role as an IDS director (8a).

4. An alleged admission of Phillips' rights by counsel for defendants in the derivative action who controlled Alleghany at various times (8a - 9a).

5. An alleged oral agreement between Phillips and counsel for Alleghany and for its controlling shareholders (9a - 11a).

6. Demand by Phillips on Alleghany and IDS for payment and the refusal thereof (11a - 12a).

7. A claim that the refusal to pay Phillips was a breach of the oral agreement and of Phillips' statutory rights (12a).

By stipulation dated December 6, 1974, and "so ordered" by the District Court on December 9, 1974 (185a - 186a), Phillips, inter alia, was granted leave to serve an amended complaint and stipulated that:

> "2. All claims against defendants contained in plaintiff's original complaint herein which arise out of alleged agreements, acts, transactions or occurrences not contained in plaintiff's Amended Complaint shall be and are dismissed with prejudice." (185a)

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2. Two other actions against Phillips and others were brought by Alleghany shareholders in this Court and in Supreme Court, New York County (Amended Complaint ¶¶4-5, 143a), but it is clear that the issues were litigated and determined in Alleghany v. Kirby (see, e.g., Amended Complaint ¶23, 147a).

Six "counts" are asserted in the amended complaint (143a - 151a) solely against IDS. (Alleghany had been dismissed from the action for lack of subject matter jurisdiction.) They may be summarized as follows:

Count I - Phillips seeks $113,940.00 as the "reasonable value" of his pro se defense in Alleghany v. Kirby, in which he now alleges having been sued as a director and chairman of the Finance and Law Committee of the Board of Directors of IDS, representing 1,899 hours at $60.00 per hour,[3] based upon Section 64 of the New York General Corporation Law - the indemnification statute which was in effect during 1960-1963 (143a - 147a).

Count II - After excluding the 1960-1961 time for which Phillips was paid by IDS as Chairman of its Finance and Law Committee, he seeks $57,600.00 as the reasonable value of his time in Alleghany v. Kirby, predicated upon an "implied or quasi-contract" theory (148a).

Count III - Once again limiting himself to $57,600.00, Phillips contends that Minnesota "common law" and "unjust enrichment" support recovery because, had Phillips retained counsel in Alleghany v. Kirby, IDS supposedly "would have been compelled to pay said attorney-at-law at least $57,600..." (148a - 149a).

Count IV - Still relying upon the same facts, Phillips asks for $57,600.00 based upon the quantum meruit value of his "services" in his pro se defense. (149a)

Count V - This rather exotic "claim" asks for a declaratory judgment that Phillips is being denied equal protection of the law in violation of the

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3. The original complaint herein sought $50.00 per hour (10a). Phillips' 20% increase in the "value" of his time spent more than a decade ago presents an interesting retroactive application of double-digit inflation.

Fourteenth Amendment, since IDS allegedly has refused to compensate Phillips because he is not a lawyer. (150a)

Count VI - IDS' defense of this action is asserted as a deprivation of due process in violation of the Fifth Amendment, and a declaratory judgment to that effect is sought. (151a)

The amended complaint makes no reference to the oral agreement relied upon in the original complaint and does not allege that Phillips served as an IDS director upon the nomination of Alleghany. Phillips admits that the amended complaint "...dropped Alleghany Corporation as a party defendant and all claims against it." (Phillips memorandum in opposition to motion by Alleghany to dismiss appeal against it, p.12).

In its answer dated December 20, 1974 (152a - 164a), IDS denied the material allegations of the amended complaint and asserted eight affirmative defenses including, inter alia, failure to state a claim (158a) and limitations (159a).

RELEVANT PRIOR PROCEEDINGS

The complex procedural tapestry of this action is woven of four primary threads.

A. The obtaining by Phillips and the vacating thereof by Judge Frankel of a default judgement against Alleghany.

B. The dismissal of the action against Alleghany for lack of subject matter jurisdiction by Judge Brieant.

C. The granting of summary judgment to IDS by Judge Tenney.

D. The refusal by Judge Tenney to disqualify counsel for Alleghany and IDS.

The prior proceedings relevant to each of these determinations follows:

A. The Improper Default Judgment Against Alleghany

1. On May 10, 1972, the twentieth day after service upon it, Alleghany timely obtained an order from Judge Lasker extending until June 2, 1972, its time to move against or answer the complaint (13a). This order is shown on the District Court docket sheet as filed on May 11, 1972 (2a).

2. Despite Alleghany's prior appearance and extension of time, on May 12, 1972, Phillips somehow obtained entry by the Clerk of the District Court of a judgment by default against Alleghany (17a).

3. After Phillips refused voluntarily to vacate the default, Alleghany moved by order to show cause on May 15, 1972, to set aside the default judgment (21a - 34a). This motion, originally returnable on May 18, was adjourned in response to various entreaties by Phillips to Judge Frankel (36a). Faced with potential loss of its right to appeal from the default judgment, 28 U.S.C. §2107, Alleghany filed a protective notice of appeal on June 8, 1972 (51a), well after IDS had also been served (74a).

4. By opinion and order dated June 15, 1972 (52a - 58a), the default judgment against Alleghany was set aside, Judge Frankel holding that "[t]he

default should never have been entered,..." (56a). The District Court also stated, "For keenly understandable reasons, the movant seeks the exaction from plaintiff of costs and attorneys' fees." Judge Frankel ordered counsel for Alleghany to serve and file by July 3, 1972, an affidavit detailing its claim. (57a).

5. On June 16, 1972, Phillips moved for reargument, primarily based upon Judge Frankel's supposed "fraud" in not revealing that he had opposed Phillips in unrelated litigation while in private practice some 14 years earlier. On July 3, 1972 Judge Frankel denied reargument (59a - 60a).

6. On July 3, 1972, Alleghany filed an affidavit of Richard L. Bond, Esq., sworn to on June 30, 1972, in support of its claim for the $4,044.60 of costs and attorneys' fees it had expended to vacate the default judgment.

7. On July 7, 1972, Alleghany moved in the District Court, pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure, to dismiss its appeal from the default judgment (89a - 93a). The motion was returnable on July 18th, was not opposed by Phillips, and was granted by Judge Brieant by memorandum order dated July 20, and entered July 21, 1972 (95a).

8. On or about July 18, 1972, Phillips filed a notice of appeal from Judge Frankel's June 15, 1972, order vacating the default judgment and July 3, 1972, order denying reargument (94a).

9. On or about July 31, 1972, Phillips moved this Court, inter alia, for an order directing the Clerk of the District Court and the United States Marshall to take all steps necessary to execute his alleged default judgment against Alleghany.

10. On August 9, 1972, Judge Timbers of this Court denied Phillips' motion, and on August 24, 1972, Phillips' motion for reconsideration also was denied.

11. On or about August 10, 1972, Phillips filed a notice of appeal from Judge Brieant's order of July 20, 1972, which granted Alleghany's Rule 42(a) motion to dismiss its appeal from the default judgment (96a).

12. On May 21, 1974, Phillips' above-described appeals of July 18, 1972, and August 10, 1972, were dismissed, sua sponte, by the Court of Appeals pursuant to §0.18(7) of the Rules of this Court supplementing the Federal Rules of Appellate Procedure.

B. The Dismissal of Alleghany

1. Judge Frankel's June 15, 1972 decision vacating the default judgment also extended Alleghany's time to answer or move against the complaint to June 27, 1972 (58a). On that date, Alleghany moved to dismiss the complaint as to it for lack of jurisdiction over the subject matter (78a - 88a). Phillips did not appear on the return date of the motion and served no opposition papers.

2. By endorsement and order dated September 25, 1972 (97a - 98a), Judge Brieant granted Alleghany's motion to dismiss, holding:

> "The Complaint does not plead a recognized statutory basis for subject matter jurisdiction over movant as required by Rule 8(a)(1), F.R. Civ. P."

3. On October 4, 1972, Phillips moved for reargument of Judge Brieant's decision. (99a)

4. By endorsement and order dated December 11, 1972 (110a - 111a), Judge Brieant granted reargument and adhered to his prior determination, holding therein with respect to Phillips' argument that jurisdiction over Alleghany is "inherent", that Alleghany v. Kirby "...was tried, and a final judgment entered on June 5, 1963. It is a closed case." (110a).

C. Summary Judgment For IDS

1. IDS moved to dismiss the complaint on June 8, 1972 (73a - 77a). In a memorandum opinion of August 28 1974, dealing with a number of then pending motions (128a - 137a), Judge Tenney directed IDS to move to amend and renew its pending motion or to move for summary judgment (137a).

2. IDS then moved on September 19, 1974, for leave to amend its motion to dismiss. During the pendency of IDS' motion, Phillips moved on October 21, 1974, for summary judgment. In the papers submitted in opposition to that motion on November 8, 1974, IDS requested dismissal of the complaint.

3. On November 18, 1974, Phillips, confronted with IDS' papers, served an amended complaint (143a - 151a), and took the position that all the pending motions were thereby mooted.

4. By stipulation dated December 6, 1974 (185a - 186a), IDS consented to the amendment and on December 20, 1974, served its answer (152a - 164a).

5. Also on December 20, 1974, IDS moved for summary judgment with respect to each of the purported claims in the amended complaint (187a - 211a; see also 212a - 229a).

6. By memorandum and order dated December 15, 1976 (359a - 378a), Judge Tenney granted IDS' motion for summary judgment, holding:

(a) Section 64 of the New York General Corporation Law is the exclusive basis for reimbursement of a director's counsel fees. (367a - 372a).

(b) Phillips' claim under Section 64 is barred by the six year limitations period then applicable to actions to recover upon a liability created by statute (372a - 373a).

(c) In any event, Phillips' claim does not come within the scope of Section 64 because "[h]e received no bill for an attorney's services." (373a - 374a).

(d) The fact that the Court decided against Phillips did not deprive Phillips of due process of law.

7. Judgment in favor of IDS was filed on December 20, 1976 (379a).

D. Denial of the Motion to Disqualify Defendants' Counsel

1. On February 4, 1975, Phillips moved for an order disqualifying Richard L. Bond, Esq., from appearing for IDS, alleging that Mr. Bond was an associate at Donovan Leisure Newton and Irvine ("Donovan Leisure") at a time when Donovan Leisure represented IDS (345a - 349a). An affidavit was submitted by Bond opposing the motion (251a - 262a), and an affidavit relating thereto was submitted by Carl E. Newton, Esq., a senior partner at Donovan Leisure (266a).

2. Oral argument on the motion took place on February 14, 1975 (267a - 294a). During the oral argument, Phillips admitted that Bond had no connection with Donovan Leisure's prior representation of IDS (287a - 288a).

3. On February 18, 1975, Phillips moved for an order staying all proceedings pending determination of his disqualification motion (302a - 317a).[4]

4. By memorandum and order dated December 15, 1976 (359a - 378a), Judge Tenney denied Phillips' disqualification motion, holding:

> (a) Mr. Bond, in his February 13, 1975, affidavit (251a - 262a), had adequately rebutted any inference which arguably might arise out of his prior association with Donovan Leisure (364a - 365a).
>
> (b) Phillips admitted this (287a - 288a) on oral argument of the motion (365a - 366a).
>
> (c) Mr. Bond, not Donovan Leisure, represents IDS in this case (366a - 367a).

RELEVANT FACTS

Alleghany v. Kirby was commenced on September 8, 1959, as a derivative action by Alleghany shareholders and originally was titled Murchison v. Kirby. Following a proxy fight and change of control, Alleghany was realigned as plaintiff in June 1962, and thereafter prosecuted the suit on its own behalf (Amended Complaint, 143a - 144a).

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4. On May 5, 1975, Phillips moved this Court in a then pending appeal, for an order disqualifying Mr. Bond. The motion was denied as moot on May 20, 1975, simultaneously with dismissal of the appeal.

The litigation in Alleghany v. Kirby arose out of prior litigation. In 1950, there was an exchange of securities between Alleghany Corporation and certain of its shareholders, the propriety of which was challenged in a series of cases consolidated in Supreme Court, New York County, as Zenn v. Anzalone. Phillips was an activist in that litigation, both as a plaintiff and as a consultant to attorneys for some of the plaintiffs. In late 1959, Zenn v. Anzalone was settled as to certain defendants with the approval of the State Court. See, Zenn v. Anzalone, 46 Misc.2d 378, 259 N.Y.S.2d 747 (Sup. Ct., N.Y. Co., 1965); Alleghany v. Kirby, supra, 218 F. Supp. 164.

The following year, the settlement of Zenn v. Anzalone was attacked in Alleghany v. Kirby for alleged fraud. Insofar as here relevant, the original Murchison complaint in Alleghany v. Kirby charged Phillips with having entered into a corrupt bargain with the settling defendant in Zenn, in return for which Phillips supposedly was to receive a responsible position with Alleghany or with IDS, which it controlled. Additionally, it was contended that Phillips' election to the IDS Board of Directors in 1960 had an adverse impact upon IDS, the stock of which was Alleghany's principal asset.

The latter charge, the attack upon Phillips as an IDS director, was not pressed after April, 1961, since Phillips ceased to be an IDS director on April 25, 1961, and an amended and supplemental complaint filed in 1962, excluded Count II of the original complaint, which had contained the attack upon Phillips qua director. Count I of the original complaint - the "corrupt

bargain" in settlement of Zenn v. Anzalone - was retained, tried before Judge Dawson, and dismissed on June 5, 1963. See, Alleghany v. Kirby, supra, 218 F. Supp. 164; Amended Complaint 144a - 145a.

Although appeals were taken from Judge Dawson's decision as to other defendants, there was no appeal as to Phillips from the June 5, 1963, dismissal of Alleghany v. Kirby (Amended Complaint 145a).

There have been repeated prior unsuccessful attempts by Phillips to collect from Alleghany Corporation on the claim asserted herein. He applied to the District Court in Alleghany v. Kirby in 1963, but the application was rejected for technical reasons (201a). He again made application in Alleghany v. Kirby in 1964, but withdrew that application on October 13, 1964 (201a - 203a).

That very same day Phillips sued Alleghany in the Supreme Court of the State of New York. That action was dismissed by order dated January 8, 1965, for lack of subject matter jurisdiction (Record on appeal, Exhibits F and I to affidavit of Richard L. Bond, Esq., sworn to on November 7, 1974, submitted in support of IDS' motion to dismiss complaint). He again sued Alleghany in the State Court in 1965, seeking recovery on different legal theories for the same time spent in his pro se defense. That action was dismissed on the merits by order entered and filed on June 6, 1966 (Sup. Ct., N.Y. Co., Index No. 12788/1965).

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY VACATED THE IMPROPER DEFAULT JUDGMENT AGAINST ALLEGHANY AND CORRECTLY DISMISSED AS TO ALLEGHANY FOR LACK OF SUBJECT MATTER JURISDICTION.

As previously noted, supra, p. 7, after Alleghany timely obtained an order by Judge Lasker on May 10, 1972, extending until June 2, 1972, its time to move against or answer the complaint (13a), Phillips obtained entry by the Clerk of the District Court on May 12, 1972, of a default judgment against Alleghany (17a).

Judge Lasker's order extending Alleghany's time provided for service upon Phillips by May 15, 1972 (13a). It is undisputed that such service was made on May 11, 1972 (33a-34a). The District Court docket (2a) shows that Judge Lasker's order was filed on May 11, 1972, and -- inexplicably -- entry of a default judgment on May 12, 1972.

Alleghany moved by order to show cause immediately upon learning of entry of the improper default judgment (21a - 45a), and it was vacated by opinion and order of Judge Frankel June 15, 1972 (52a-58a); Judge Frankel held that "[t]he default should never have been entered...." (56a). On July 3, 1972, Judge Frankel denied reargument (59a-60a).

It is this judgment that Phillips urges this Court to enforce (Phillips Br. pp.60-66).

Phillips does not suggest, indeed cannot suggest, that Judge Frankel was wrong on the merits. His sole argument is procedural: that Alleghany divested the District Court of jurisdiction to vacate the judgment by filing a precautionary notice of appeal -- after Phillips' illness delayed proper disposition of Alleghany's motion to vacate the default judgment; and that, by dismissing the appeal before it was docketed, Alleghany waived all objections to the default judgment, even though the notice of appeal was a nullity in this multi-defendant action absent a Rule 54(b) determination.

On the face of the matter, Phillips' position is unjust. Additionally, it is erroneous for the following reasons:

(a) Pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, jurisdiction remained in the District Court to vacate a default judgment entered as a result of a clerical error, even during the pendency of an appeal, in circumstances where the appeal had not been docketed;

(b) In the absence of an express determination under Rule 54(b) that there is not just reason for delay and an express direction for the entry of judgment, the notice of appeal was a nullity and the District Court was not divested of jurisdiction to vacate the default judgment as to one defendant in a multi-defendant case.

(c) The default judgment against Alleghany was void and a nullity because there was no federal subject matter jurisdiction as to Alleghany; and

(d) Phillips' claims against Alleghany were dismissed with prejudice by stipulation executed by Phillips after the default judgment was vacated and the complaint dismissed as to Alleghany, and in these circumstances there is no case or controversy between Phillips and Alleghany cognizable in this Court.

A. The Filing by Alleghany of a Protective Notice of Appeal, Never Docketed, Did Not Divest Judge Frankel of Jurisdiction to Vacate a Default Judgment Entered by Clerical Error Pursuant to Rule 60(a) of the Federal Rules of Civil Procedure.

Rule 60(a) of the Federal Rules of Civil Procedure, provides:

> "Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

In American Trucking Ass'n v. Frisco Transp. Co., 358 U.S. 133, 145 (1958), Chief Justice Warren noted:

> "It is axiomatic that courts have the power and the duty to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake. [citation omitted]. Rule 60(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., recognizes this power ..."

Entry of a default judgment is a function to be performed by the Clerk of the Court. Rules 55(a) and 55(b)(1), Federal Rules of Civil Procedure. The judgment entered by the Clerk on May 12, 1972 (17a), contains this recitation:

"... the said defendant [Alleghany] not having appeared, answered or made any motion with respect to the complaint herein..."

This statement undeniably is mistaken. The District Court docket sheet shows on its face that the order extending Alleghany's time to answer was filed on May 11, 1972, the day before entry of the default judgment.[5]

In Judge Frankel's memorandum order of June 15, 1972, vacating the default judgment (52a-58a) because "[t]he default should never have been entered" (56a), it is apparent that the entry of the default judgment was viewed as a clerical mistake.

Vacating a default judgment entered by clerical mistake is properly within the scope of Rule 60(a). A comparable situation was considered in National Equipment Rental, Ltd. v. Figurine Salon of Calif., Inc., 19 F.R. Serv.2d 1426, 1428 (E.D.N.Y. 1975), where a default judgment had been entered when an answer was in the court file. Judge Judd quoted Rule 60(a) and portions of 60(b) and vacated the default judgment, holding:

"The Clerk's failure to check the file and observe that there was in fact an answer to the complaint, was a clerical mistake. The mistake might have been noticed if the default judgment had been submitted to a judge of this court for consideration, but that was not done or required.

* * *

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5. It also would appear to be a plain error of judgment to enter a default judgment on the 21st or 22nd day after service of process, since Rules 5(a) and 5(b) of the Civil Rules provide that an answer may be served by mail and might well not have been received by then.

"It is not necessary to determine the scope of the court's power under F. R. Civ. P. 60(b)(6), concerning 'any other reason justifying relief,' since it was obviously a mistake in the Clerk's office of this court to note a default which his own records showed did not in fact exist. A clerical error [under Rule 60(a)] has been defined as 'an error made by a clerk in transcribing or otherwise,' as distinguished from a mistake of the court. West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702, 705 (5th Cir. 1954) (emphasis supplied); American Trucking Associations, Inc. v. Frisco Transportation Co., 358 U.S. 133, 145, 79 S. Ct. 170, 177 (1958)."

It was equally a clerical mistake in this action for the Clerk to have issued the default judgment without adequately checking the file, which would have disclosed the filing on the previous day of an order extending Alleghany's time (2a).

Furthermore, it is unquestioned that Alleghany's appeal never was docketed. On Alleghany's motion in the District Court (89a - 93a), Judge Brieant properly dismissed the undocketed appeal pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure (95a).

Rule 60(a) of the Civil Rules expressly provides that:

"During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court."

It thus is unquestionable that Judge Frankel had jurisdiction under Rule 60(a) to vacate the judgment. Although Alleghany's motion specified Rule 60(b), that is irrelevant. Rule 60(a) provides that a clerical error "may be corrected by the court at any time of its own initiative".

In addition, this Court in Dunn v. J.P. Stevens & Co., Inc., 192 F.2d 854, 855 (2d Cir. 1951), held:

> "...the moving party need not cite by their respective numbers the rules relied on when those rules are clearly indicated, Galdi v. Jones, 2 Cir., 141 F.2d 984, 992,..."

Applicability of Rule 60(a) clearly was indicated.[6]

Finally, this Court is not constrained from affirming Judge Frankel's order under Rule 60(a), whether or not Judge Frankel specifically relied on that Rule. As noted by the Supreme Court in California Bankers Association v. Shultz, 416 U.S. 21, 71 (1974), parties "...are free to urge in this Court reasons for affirming the judgment of the District Court which may not have been relied upon by the District Court,..." In S.E.C. v. Chenery Corp., 318 U.S. 80, 88 (1943), Justice Frankfurter stated:

> "... we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' Helvering v. Gowran, 302 U.S. 238, 245, 58 S. Ct. 154, 158, 82 L.Ed. 224."

See also, Lum Wan v. Esperdy, 321 F.2d 123, 125-26 (2d Cir. 1963).

There was clear jurisdiction to vacate the default judgment under Rule 60(a), and it was appropriate to do so. Judge Frankel's decision should be affirmed on this ground.

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6. See also, Rule 1 of the Federal Rules of Civil Procedure, providing that the Rules "... shall be construed to secure the just, speedy, and inexpensive determination of every action."

B. The Filing by Alleghany of a Protective Notice of Appeal, Void on its Face, Did Not Divest the District Court of Jurisdiction to Vacate the Default Judgment Pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure.

Alleghany was served on April 20, 1972 (2a). The default judgment was filed on May 12, 1972 (2a). An additional summons was issued on May 15, 1972 (12a), and IDS was served on May 19, 1972 (74a).

Alleghany's protective, interlocutory notice of appeal, filed on June 8, 1972 (51a), captions both IDS and Alleghany as defendants and purports to appeal "from the Judgment by Default entered against Alleghany Corporation." Phillips argues that the filing of the notice divested the District Court of jurisdiction to vacate the judgment (Phillips Br. pp.60-62).[7]

Since this was a multi-defendant case at the time the notice of appeal was filed, both defendants having been served, there could be no final appealable determination absent "...an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Rule 54(b), Federal Rules of Civil Procedure; 28 U.S.C. §1291; Rabekoff v. Lazere & Co., Inc. 323 F.2d 865, 866 (2d Cir. 1963), Bailey v. McCann, 539 F.2d 501 (5th Cir. 1976). As noted in International Controls Corp. v. Vesco, 535 F.2d 742, 747 (2d Cir. 1976), "This court has repeatedly stressed the importance of strict adherence to the certification requirements of Rule 54(b)."

7. The law raised by Phillips goes only to the filing of a notice of appeal with respect to a final, appealable judgment, which this was not. In any event, the current viability of the law he cites was placed in serious question by the reasoning of the Supreme Court in Standard Oil Co. of California v. U.S., ___ U.S. ___, 97 S. Ct. 31 (1976).

In fact, on October 7, 1974, this Court dismissed an attempted interlocutory appeal by Phillips for lack of jurisdiction, responding to defendants' motion pointing out the lack of certification pursuant to Rule 54(b).[8]

The applicable law is summarized by Judge Duffy in Lowenschuss v. Kane, 392 F. Supp. 59, 59-60 (S.D.N.Y., 1974):

> "The general rule is, as plaintiff contends, that the filing of a timely and sufficient notice of appeal has the effect of immediately transferring jurisdiction from the district court to the court of appeals and divests the district court of authority to proceed further with such matters, except in aid of the appeal. 9 J. Moore, Federal Practice ¶203.11, at 734 (2d ed. 1973). However, as Professor Moore states in his treatise, '[t]he rule that the taking of an appeal divests the district court of jurisdiction would seem to presuppose the taking of a valid appeal from an appealable order' Id. at 736 (emphasis added). In this case the Second Circuit has, in effect, already decided that the appeal was not a valid appeal from an appealable order. Thus, since the purported appeal was invalid the mere act of filing that appeal did not divest me of jurisdiction. Again quoting Professor Moore:
>
> > 'To hold that the mere act of filing of a notice of appeal automatically divests the district court of jurisdiction is to hold that a party can interrupt proceedings in the district court at will. Whenever, then, an attempted appeal is manifestly ineffective to invoke the jurisdiction of the court of appeals, the district court should be free to proceed as though no appeal has been taken, which is the fact.' Id. at 738.
>
> "See Ruby v. Secretary of United States Navy, 365 F.2d 385, 389 (9th Cir. 1966); Euziere v. United States, 266 F.2d 88 (10th Cir. 1959), vacated on other grounds, 364 U.S. 282, 80 S.Ct. 1615, 4 L.Ed.2d 1720 (1960); Smith v. Insurance Co. of No. Amer., 213 F.Supp. 675, 680 (M.D. Tenn. 1962)."

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8. Phillips' argument (at page 64 of his brief) that Alleghany waived all objections to the default judgment by its voluntary dismissal of the interlocutory appeal by motion pursuant to Rule 42(a) of the Federal Rules of Appellate Procedure granted by Judge Brieant on July 20, 1972 (95a), is patent nonsense. This is so, particularly in view of this Court having dismissed three prior attempted appeals by Phillips in this case - two for lack of appellate jurisdiction and one for failure to prosecute. See, Tracy v. Robbins, 373 F. 2d 13 (4th Cir. 1967).

Similarly, Judge Brieant held in the instant case, in dismissing Alleghany for lack of subject matter jurisdiction during pendency of an attempted interlocutory appeal by Phillips from Judge Frankel's orders (subsequently dismissed, sua sponte, by this Court for lack of prosecution), that the District Court was not divested of jurisdiction as to all matters by the taking of an interlocutory appeal (97a - 98a).

Manifestly, Judge Frankel was not ousted of jurisdiction by Alleghany's filing its interlocutory appeal - void on its face - and Judge Frankel appropriately and correctly vacated the default judgment pursuant to Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure.

C. The District Court Correctly Dismissed Alleghany For Lack of Subject Matter Jurisdiction.

On September 25, 1972, Judge Brieant granted Alleghany's motion to dismiss (97a - 98a), holding that, "The complaint does not plead a recognized statutory basis for subject matter jurisdiction over movant as required by Rule 8(a)(1), F. R. Civ. P." (97a).

On October 4, 1972, Phillips moved for reargument on an ancillary jurisdiction theory, making essentially the same arguments made herein at pages 19-21 of his brief. On December 11, 1972, Judge Brieant granted reargument and adhered to his prior determination, first summarizing Phillips' position:

"On reargument plaintiff asserts that subject matter jurisdiction exists because the claim is for indemnification, as to 'costs', arising out of prior litigation in this Court. Plaintiff was a defendant in a case, Alleghany Corporation v. Kirby, et al., 60 Civ. 3511, which was once pending in this Court." (110a)

and then holding:

"The 1960 case was tried, and a final judgment entered on June 5, 1963. It is a closed case. See 218 F.Supp. 164, 333 F.2d 327; en banc 340 F.2d 311, 384 U.S. 28 (1966).

"As a successful defendant therein, plaintiff here claims he has substantive rights, under Alleghany corporate by-laws, and New York and Maryland statutes, to recover legal fees as costs.

"Possibly the Court in Alleghany Corporation v. Kirby, 60 Civ. 3511, could have adjudicated these rights as an incidental aspect of that case, in which subject matter jurisdiction did exist, and might have done so under some theory of pendent jurisdiction, or ancillary power. But it did not do so.

"Plaintiff now asks us (Memorandum of Oct. 5, 1972, p.3) to '... regard the Complaint herein as filed also in ... 60 Civ. 3511, since Maryland law provides for filing [of the claim for 'costs' of a successful defendant] in the original action or by independent action.

"There is no authority or basis for doing so. The 1960 litigation is a closed case, by entry of a final judgment affirmed on appeal, and by the passage of time." (110a)

Judge Brieant is patently correct. See also discussion, infra, pp.42-45.

Plaintiff's other objection to Judge Brieant's dismissal of Alleghany is his argument that Judge Brieant was divested of jurisdiction by Alleghany's interlocutory notice of appeal. (Phillips Br. p. 66). Judge Brieant dealt with this issue:

"We are a statutory court; we may, and indeed must, in compliance with Rule 12(h)(3), dismiss whenever lack of subject matter jurisdiction is apparent. If the mere taking of an interlocutory appeal ousted our jurisdiction as to all matters, there would be no purpose in or need for Rule 62(g), F.R.Civ.P., which allows the Court of Appeals to stay all proceedings during the pendency of an appeal. See U.S. v. 329.22 Acres of Land, etc., 307 F. Supp. 34, 52 (M.D. Fla. 1968), aff'd, 418 F.2d 551." (97a - 98a)

In sum, Alleghany was correctly dismissed for lack of subject matter jurisdiction. This also, of course, makes the default judgment void and a nullity and, were one needed, is further basis for affirming dismissal of that judgment.

D. Phillips Is Barred From Pursuing His Claims Against Alleghany by His Stipulation Dismissing Those Claims More Than Two Years After the Default Judgment Was Vacated and His Claims Against Alleghany Dismissed.

On April 7, 1977, Alleghany moved in this Court for an order dismissing so much of this appeal as is taken against Alleghany on the ground that Phillips' claims against Alleghany are barred by his stipulation on December 6, 1974, that:

"All claims against defendants contained in plaintiff's original complaint herein which arise out of alleged agreements, acts, transactions or occurances not contained in plaintiff's Amended Complaint shall be and are dismissed with prejudice." (185a)

As shown in Alleghany's motion papers, all claims against Alleghany included in the original complaint (7a - 12a) were omitted from the amended complaint (143a - 151a), and were thereby dismissed with prejudice. Phillips'

papers in opposition to the motion concede this point, stating: "The amended complaint dropped Alleghany Corporation as a party defendant and all claims against it." (Phillips Memo., April 14, 1977, p.12).

Phillips' principal response to Alleghany's motion is that he dismissed claims, but not the default judgment. However, when the stipulation was signed, there was no default judgment - it had been vacated two years earlier.

Consequently, since all Phillips' claims against Alleghany were dismissed with prejudice, there is no dispute -- there is no justiciable case or controversy -- and this Court is without jurisdiction. S.E.C. v. Medical Committee for Human Rights, 404 U.S. 403, 407 (1972).

On April 19, 1977, the panel of this Court before which Alleghany's motion was returnable referred the motion to the panel that would hear the appeal. It is respectfully requested that the motion be granted, and so much of Phillips' appeal as pertains to Alleghany be dismissed on the ground of prior consensual dismissal by stipulation of the parties on December 6, 1974.

POINT II

PHILLIPS HAS NO CLAIM FOR INDEMNIFICATION UNDER STATUTORY OR COMMON LAW

The first four counts of the amended complaint are predicated upon the purported right of a corporate director to indemnification or reimbursement under statutory or common law. No legal basis exists for the relief Phillips seeks, and the claims were properly dismissed by Judge Tenney.

A. The Relief Demanded in the Complaint May Be Sought Only Pursuant to the Applicable New York Indemnification Statute.

Phillips' purported claims for indemnification or reimbursement for the time he spent in 1960-1963 in his pro se defense of Alleghany v. Kirby are governed by New York statute.

It is established New York law that there is no common law right to indemnification or reimbursement. In Bailey v. Bush Terminal Co., 46 N.Y.S.2d 877 (Sup. Ct. N.Y. Co. 1943), aff'd without opinion, 267 App. Div. 899 (1st Dep't), aff'd, 293 N.Y. 735 (1944), the Supreme Court explicitly held that, "...no common law right to recover reimbursement exists." 46 N.Y.S.2d at 880. Citing Bailey, the New York Court of Appeals held in Schwarz v. General Aniline & Film Corp., 305 N.Y. 395, 404 (1953), "[r]eimbursement for such expenses could not be had at common law." See also, Diamond v. Diamond, 307 N.Y. 263 (1954).

The New York indemnification statute applicable herein, Article 6-A of the General Corporation Law, was enacted in 1945.[9] The legislative history to the statute is set forth in Schwarz v. General Aniline & Film Corp., supra, 305 N.Y. at 400-401:

> "As we know, these provisions for reimbursement [the predecessor statute to Section 64] came into the statute law after, and because of, the famous opinion of Judge Crouch, sitting as an Official Referee, in 1939, in New York Dock Co. v. McCollum, 173 Misc. 106, 16 N.Y.S.2d 844. See Bailey v. Bush Term. Co., 293 N.Y. 735, 56 N.E.2d 739. There it had been decided, in effect, that the corporation in whose behalf a stockholder's suit is brought, was not obligated, at common law, to pay legal fees incurred by its directors in defending themselves as individual defendants in such an action. That left corporate directors (and officers) in an unsatisfactory position since, when sued and although successful in a stockholder's suit, they would find themselves exonerated from fault but subject to the heavy attorneys' fees characteristic of the defense of such actions....Obviously, the Legislature was talking about the financial difficulties that had befallen certain corporate directors, officers and agents when they were sued, individually, in stockholders' suits, and had to pay their own lawyers."

Article 6-A was Phillips' exclusive remedy. Section 64 of the General Corporation Law provided the right to indemnification "...in the instances specified in section sixty-eight of this chapter...." Section 68 provided in pertinent part:

> "Sections sixty-four, sixty-five, sixty-six and sixty-seven of this chapter shall apply to an application made to a court in this state in any of the following cases:
>
> ....
>
> (b) when such expenses were incurred in an action or proceeding maintained in a court in this state;

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9. Article 6-A was superceded by §§721-726 of the New York Business Corporation Law, effective September 1, 1963.

(c) when the application is made by a resident of this state and the director, officer or employee was a resident of this state at the time of the accrual of the alleged cause of action asserted in the litigation in which such expenses were incurred." [emphasis added]

This language is mandatory, not permissive, and excludes application of any other common law or statutory remedy.

Judge Tenney, after reviewing these statutes (368a - 370a), held them applicable to this proceeding, stating:

"Thus, the statute, by its express terms, is to be applied when the right of reimbursement established by section 64 is asserted in a New York court under any one of the conditions of sections 68(a), (b) or (c). In the case at bar, both (b) and (c) are satisfied: the earlier action, Alleghany Corp. v. Kirby, was 'in a court in this state'; Phillips is and was a resident of New York. The statute works as a direct instruction to a New York court to apply the New York indemnification provisions when, as under the circumstances of this case, a plaintiff makes application for his 'reasonable expenses' as described in section 64." (370a)

Judge Tenney then added:

"Furthermore, the right established by the statute would seem to be the exclusive means to recovery of such expenses...." (370a),

and after reviewing the applicable New York law (370a - 371a), held:

"The sole law to be applied to this action by a court in New York is the indemnification portion of the General Corporation Law. Plaintiff's attempts to avoid the indemnification statute by resurrecting his claim under other common law theories must fail." (371a)

In his brief Phillips concedes there is no New York common law right to reimbursement (Phillips Br. p.34),[10] but urges that he has a right to recover under Minnesota common law (Phillips Br. pp.33-38) and under a Minnesota statute enacted on June 7, 1969, six years after he was dismissed out of Alleghany v. Kirby - Minn. Statutes §301.095 (Phillips Br. pp.39-40).

These arguments fail because, as noted supra, Article 6-A provides the exclusive remedy in a suit brought in a court situated in New York seeking director's indemnification, and because Article 6-A mandates that the choice of law to be applied in such an action is New York substantive law. Section 6 of the Restatement of Conflict of Laws 2d (1971) succinctly states the relevant choice of law principle:

> "1. A Court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."

Judge Tenney correctly held that, "[h]ere the applicability of New York law is clearly established by New York statute [See §68 of the New York General Corporation Law quoted in relevant part at 369a-370a] and Minnesota case law".[11] (368a)

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10. Inconsistently, however, Phillips argues that he can recover on claims of "unjust enrichment" (Phillips Br. p.38) and quantum meruit (Phillips Br. p. 41). Such claims clearly would be barred by the holding in Bailey v. Bush Terminal Co., supra.

11. As noted by Judge Tenney, citing In re E. C. Warner Co., 237 Minn. 207, 45 N.W.2d 388 (1950), the position of a director is sui generis. Judge Tenney then held "thus, Minnesota law would look exclusively to the law governing indemnification of corporate directors and officers under these circumstances, and within this specific area a court in New York must apply New York law." (372a) (footnote omitted).

Section 68 could not be a clearer statutory directive of choice of law. By its terms, it dictates applicability of §64 when the expenses were incurred in an action maintained in a court in New York, §68(b), or by a New York resident, §68(c). As found by Judge Tenney and unchallenged by Phillips, both circumstances are herein present. Thus, Phillips' conflict of laws analysis would only be reached "[w]hen there is no such directive," and has no application here. Section 6(2), Restatement Conflict of Laws 2d, supra.

Phillips' argument that the state of incorporation - Minnesota for IDS - determines the choice of law (Phillips Br. p.36) is incorrect. In Austrian v. Williams, 120 F.Supp, 900, 904 (S.D.N.Y. 1953), reversed on other grounds, 216 F.2d 278 (2d Cir. 1954), cert. denied 348 U.S. 953 (1955), Judge Weinfeld applied Article 6-A, despite the relevant state of incorporation being Virginia, where the subject action took place in New York. For these reasons, Phillips' claim under Minnesota common law is unavailing; the New York Statute is both exclusive and directive of the choice of law to be applied.[12]

Additionally, application of the 1969 Minnesota statute §301.095 (quoted at pages 4-5 of Phillips' brief), would require retroactivity not found in the statute. Phillips' claim arose not later than 1963, and he nowhere supports the propriety of retroactive application (Phillips Br. pp.39-40).

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12. Phillips' arguments that, where there are two remedies for the protection of a right one may be barred and the other not (Phillips Br. pp. 33-35, 39) citing inter alia, U. S. v. Whited & Wheless, 246 U.S. 552 (1918); and that "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible" (U. S. v. Borden Co., 308 U. S. 188, 198 (1939)), have no bearing either on a statute which in terms, provides an exclusive directive or on the issue of choice to be made between the laws of two states.

Minnesota law is squarely against the position Phillips has adopted. In Dixon v. Northwestern National Bank of Minneapolis, 275 F. Supp. 582, 583 (D. Minn. 1967), the Court stated:

> "It is clear that absent a contrary indication by the Legislature a law is not to be construed retroactively. Minnesota Statutes Annotated 645.21 provides that:
>
> > 'No law shall be construed to be retroactive unless clearly and manifestly so intended by the Legislature.'
>
> Two Minnesota Supreme Court decisions give voice to this principle. Chapman v. Davis, 233 Minn. 62, 45 N.W.2d 822 (1951), and Hughes v. Lucker, 233 Minn. 207, 46 N.W.2d 497 (1951)."

In policy terms, Phillips' retroactivity argument would mean that this statute suddenly would give rise to claims for statutory indemnification which arose at any time during the entire history of the State of Minnesota, since - Phillips argues - his claim accrued with the enactment of the statute on June 7, 1969. This result is not "clearly and manifestly" the intention of the statute.

For these reasons, Phillips' claim - if any he has - must be found in §64 of the General Corporation Law. As shown, infra, he has not stated a claim under that statute, and any such claim would be time barred.

B. Phillips Has Not Incurred Any Indemnifiable Expenses and, Not Being an Attorney, Cannot Recover Attorneys' Fees.

Phillips alleges in Count I of his amended complaint (145a) that the New York statute applicable to his claim is Section 64 of the General Corporation

Law. We agree. That section provides:

> "Any person made a party to an action, suit or proceeding by reason of the fact that he, his testator or intestate, is or was a director, officer or employee of a corporation shall be entitled to have his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding, and in connection with an appeal therein, assessed against the corporation or against another corporation at the request of which he served as such director, officer or employee, upon court order, in the manner and to the extent provided by sections sixty-five, sixty-six and sixty-seven of this chapter, and in the instances specified in section sixty-eight of this chapter, except in relation to matters as to which it shall be adjudged in such action, suit or proceeding that such officer, director or employee is liable for negligence or misconduct in the performance of his duties."

Thus, for expenses, including attorneys' fees, to be assessable against a corporation under the applicable New York statute, they must have been "actually and necessarily incurred by him." Similarly, the 1969 Minnesota statute, §301.095, speaks of "expenses, including attorneys' fees, ... actually ... incurred by him." The Minnesota case, In re E. C. Warner Co., supra, 45 N.W.2d at 390, upon which Phillips relies as stating the Minnesota common law (Phillips Br. pp.34,37), deals with "attorneys fees which were incurred..."

The two issues raised by Phillips' claim are whether his time, allegedly spent as pro se counsel, is a reimbursable expense and whether Phillips actually has incurred any expense.

In granting summary judgment, Judge Tenney held:

"Plaintiff's claim also fails because it does not come within the scope of the statute. Section 64 of the New York General Corporation Law provided that 'a director, officer or employee of a corporation' was entitled to reimbursement for 'his reasonable expenses, including attorneys' fees, actually and necessarily incurred by him' in the defense of the actions covered by the statute [emphasis added]. In discussing the purpose of this provision, the New York Court of Appeals made it quite clear that the statute was intended to alleviate the burden placed on corporate directors and officers by large attorneys' bills. The court stated that section 64 was passed to change the common law rule by which

> 'the corporation in whose behalf a stockholder's suit is brought, was not obligated ... to pay legal fees incurred by directors in defending themselves as individual defendants in such an action. That left corporate directors (and officers) in an unsatisfactory position since, when sued and although successful in a stockholder's suit, they would find themselves exonerated from fault but subject to the heavy attorneys' fees characteristic of the defense of such actions ...'

"Schwarz v. General Aniline & Film Corp., supra, 305 N.Y. at 400, 113 N.E.2d at 535.

"Phillips was not subject to any such 'heavy attorneys' fees.' He received no bill for an attorney's services." (373a - 374a)

Judge Tenney correctly found Phillips outside the scope of §64 because Phillips had not incurred any attorneys' fees. The District Court found it unnecessary to reach the issue of whether, in any event, a non-lawyer could recover attorneys' fees. Phillips is not an attorney. He voluntarily chose to represent himself in Alleghany v. Kirby. In this action, he seeks payment at the rate of $60 per hour for time allegedly spent in his pro se defense of that action.

Phillips misses Judge Tenney's point when he argues - based upon Jessup v. Smith, 223 N.Y. 203 (1918), and Colpan Realty Corp. v. Great American Ins. Co., 83 Misc.2d 730, 373 N.Y.S.2d 802 (Sup. Ct. Westchester Co. 1975) - that it is unnecessary for him to have paid or received a bill for attorneys' fees

(Phillips Br. 44-47)[13]. Judge Tenney's point was that Phillips had not incurred any attorneys' fees. There was no obligation to pay counsel fees - a predicate to both cited cases.

In interpreting Section 64 of the New York General Corporation Law, one must begin with the strictures set out by the New York Court of Appeals in Schwarz v. General Aniline & Film Corp., supra, 305 N.Y. at 404-405.

> "Reimbursement for such expenses could not be had at common law, Bailey v. Bush Term. Co., 293 N.Y.735, 56 N.E.2d 739.
>
> ....
>
> "Section 64, therefore, is in derogation of both the common law and the contract rights or engagements of the parties. Strict construction, therefore, is the rule applicable, Matter of Ryan's Will, 291 N.Y. 376, 400, 52 N.E.2d 909, 919; Erickson v. Macy, 231 N.Y. 86, 91, 131 N.E. 744, 745, 16 A.L.R. 1322; Dean v. Metropolitan Elevated Ry. Co., 119 N.Y. 540, 547, 23 N.E. 1054, 1055. Only by observing such a rule is the extension or broadening of a legislative change avoided and true legislative intent made effective."

See also, Diamond v. Diamond, supra.

This legislative history of §64, quoted in part by Judge Tenney (373a-374a), plainly indicates that the purpose of the statute was to relieve directors of the economic burden of counsel fees, not to provide them with an additional

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13. First Iowa Hydro Electric Coop v. Iowa-Illinois Gas and Electric Co., 245 F.2d 630 (8th Cir. 1957), cited at pp.45, 47 of the Phillips Brief, deals only with an attorney's claim to a direct right of action for attorneys' fees and is therefore irrelevant.

source of income. Phillips, however, claims that a director is entitled to reimbursement for his own time as an "expense" under §64, although no relevant authority is asserted in support of that novel proposition (Phillips Br. 56-59).

We have found no case in which a director-defendant has sought, much less received, reimbursement for his own time. Phillips cites none.[14] We have, however, found a case in which a derivative plaintiff seeking counsel fees under §61-a of the General Corporation Law also sought the sum of $5,000 to compensate for time the plaintiff spent with his attorney in the preparation, hearings and trial of the case. The court in Masholie v. Salvator, 182 Misc. 523, 46 N.Y.S.2d 596, 599 (Sup. Ct. Queens Co. 1944), affirmed in part, modified in part on other grounds, 269 App. Div. 846, 55 N.Y.S.2d 395 (2d Dep't. 1945), unequivocally responded:

> "He is not entitled, however, to reimbursement for his personal services and private expenses. Trustees v. Greenough, 105 U.S. 527, 537, 538, 26 L.Ed. 1157. Section 61-a of the General Corporation Law, added L.1941, c. 350, § 1, effective April 14, 1941, [the predecessor statute to article 6-A] has not in that respect changed the rulings of earlier cases. Neuberger v. Barrett, 180 Misc. 222, 39 N.Y.S.2d 575."

Since Phillips cannot recover as an indemnifiable expense his own time spent in his capacity as a defendant, the only conceivable remaining ques-

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14. It is noteworthy that in In re Hooker's Estate, 173 Misc. 515, 18 N.Y.S.2d 107, 113 (Surrogate's Court, Kings Co. 1940), cited by Phillips at page 18 of his brief, "expense" was defined as requiring that a sum be "... actually paid out or spent as expense, or, ... be necessary of such actual payment or spending...." Phillips also cites In re E. C. Warner Co., supra, (Phillips Br. p.59) which allowed recovery only of attorneys' fees incurred and never suggested that the director might recover for his own time spent in defending the action.

tion becomes whether his own time spent in conducting his pro se defense is indemnifiable under the statute as "attorneys fees, actually and necessarily incurred by him."

The New Jersey Court of Chancery in Solimine v. Hollander, 129 N.J.Eq. 264, 19 A.2d 344, 348 (1941), stated succinctly that the function of their indemnification statute was that it,

> "...enables the director of limited means to enlist the professional service and aid of competent counsel who will be willing to undertake the defense upon the assurance that, if successful, payment would be forthcoming from the corporate treasury." [emphasis added.] [15]

The policy and legislative intent of §64 of the General Corporation Law lend no support to Phillips' claim. It only remains to analyze and -- as directed by the New York Court of Appeals -- strictly construe the language of the statute. Section 64 provides indemnity for "attorneys' fees, actually ... incurred by him". Phillips had no "attorneys' fees". He represented himself, and he is not a lawyer. Phillips neither had "actual" attorneys' fees nor "incurred" attorneys' fees. He has not alleged that he paid or owes any money to a lawyer for representing him. In short, there is no construction of the statute that will allow him to recover on his claim, [16] and Judge Tenney properly granted summary judgment in favor of IDS.

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15. This case was extensively and approvingly quoted by the Minnesota Supreme Court in In re E. C. Warner Co., supra, 45 N.W.2d at 393.

16. This same analysis is applicable to Phillips' claims under Minnesota common and statutory law.

Judge Tenney also would have been correct had he held that Phillips cannot collect legal fees because he is not an attorney. Although Judge Tenney did not reach this issue, Phillips deals with it in his brief (Phillips Br. pp.48, 50-53).

The Court of Appeals for the Third Circuit, in In re United Corporation, 249 F.2d 168, 177 (3rd Cir. 1957), stated that, "...Phillips is not a lawyer and cannot be compensated as such."

The right to recover compensation for services rendered in the capacity of an attorney or counselor at law is confined to those persons who have been duly admitted and entitled to practice as such in the courts at the time the services were rendered. Generally, admission to practice law and discipline of persons so admitted are vested exclusively in the courts of the various states, and the privilege of engaging in the practice of law is strictly confined to individual attorneys who have been duly licensed upon a proper showing of character and competence, and who are at all times subject to rigid rules. See, J. H. Marshall & Associates, Inc. v. Burleson, 313 A.2d 587 (D.C. App. 1973); Taft v. Amsel, 23 Conn. Sup. 225 (1962); Spivak v. Sachs, 16 N.Y.2d 163 (1965).

Phillips in essence contends that, because he is entitled to represent himself pro se (which IDS does not dispute),[17] he is entitled to collect counsel

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17. Phillips repeatedly argues that he is entitled to compensation as an attorney because, in the definitional Section of the New York Civil Practice Law and Rules, §105(c), an attorney is defined as including "...a party prosecuting or defending an action in person." This section gives Phillips the right to defend himself. It is not found in the General Corporation Law and does not speak to whether he is entitled to be compensated as an attorney.

fees for doing so. That contention has no support in the statute, in case law or in sound policy.

The purpose of indemnification statutes, as demonstrated supra, is to prevent directors in appropriate cases from suffering out-of-pocket litigation losses; it is not the purpose of such statutes to create in-pocket compensation. Phillips' reference to other litigation where he has received compensation (Amended Complaint ¶22, 147a; Phillips Br. pp.15, 22,24,47,51) was in circumstances where he participated on the plaintiff's side of class or derivative litigation which resulted in a benefit for the class or corporation; in Zenn v. Anzalone, supra, his compensation was for services as a "consultant" to plaintiffs and their counsel. The creation of a fund which permitted compensation in that case has no bearing upon the instant situation, where Phillips defended his own conduct including that which led to his "consultant" fee in the Zenn litigation.

Finally, Phillips erroneously attempts to infuse this action with constitutional implications, which clearly do not exist; he argues that denying him attorneys' fees because he is not an attorney is a violation of due process and equal protection. (Phillips Br. pp.48,50,54). He further contends that IDS' refusal to pay his claim also violates constitutional principles (amended complaint, Counts V and VI, 150a - 151a).

Merits of that position aside, it is apparent that IDS cannot be said to have violated the due process or equal protection clauses.

Governmental action is a necessary condition precedent and IDS' refusal to pay plaintiff's claim does not supply requisite governmental action. Ex parte Commonwealth of Virginia, 100 U.S. 339, 347 (1880); Cogswell v. Board of Levee Com'rs of Orleans Levee Dist., 142 F.2d 750 (5th Cir. 1944).

If IDS' resistance in litigation could rise to deprivation of a constitutional right, as alleged by Phillips, then every litigation would be subject to review on appeal on such frivolous constitutional grounds. Plainly, this is absurd, and Judge Tenney so held (374a - 375a).

The essence of Phillips' grievance in Counts V and VI of the amended complaint is that, since he successfully defended himself in Alleghany v. Kirby, it is unfair not to give him the fees to which counsel would have been entitled if Phillips had been represented by counsel.

There is a huge misassumption in Phillips' reasoning. The unfairness he perceives[18] is not subject to attack on constitutional grounds. Judge Tenney correctly held:

> "The clarity of the statutory purpose behind the indemnification provisions also disposes of Phillips' equal protection argument. In distinguishing between those who pay attorneys to represent them and those who represent themselves, a distinction which, does not involve a 'suspect classification' or a 'fundamental right,' the New York legislature acted to relieve financial burdens experienced by the former but not experienced by the latter. This rational legislative response to a serious problem satisfies the constitutional standard." (374a).

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18. Obviously there is no unfairness in legislation authorizing payment of professional fees incurred, while denying comparable aid to "do-it-yourselfers". Are programs supporting payment of medical and surgical fees unconstitutional for failure to provide comparable economic support for self-healers?

It is well established that the Fifth and Fourteenth Amendments do not place a straightjacket on the legislatures. Lawmakers are free to establish classifications and discriminations, provided any state of facts may reasonably be conceived to justify them. McGowan v. Maryland, 366 U.S. 420, 426 (1961). See also, Dandridge v. Williams, 397 U.S. 471 (1970); Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955).

Whether or not Mr. Phillips agrees with the legislative judgments, no serious argument can be made that the scheme of the indemnification statute is irrational.

Compensation of director-defendants for out-of-pocket expenses in successfully defending suits against them is clearly a legitimate legislative goal, and is entirely different from paying a pro se defendant for his time in defending himself. The statutes at issue are designed to protect against economic loss, not to create an economic gain. As the United States Supreme Court stated in Tigner v. Texas, 310 U.S. 141, 147 (1940), "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." See also, Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

Judge Tenney properly granted summary judgment in favor of IDS.

C. Plaintiff's Claims Are Barred by The Statute of Limitations.

Alleghany v. Kirby was dismissed as to Phillips by final judgment entered on June 5, 1963. No appeal was taken as to Phillips. His alleged

claim under the indemnification statute accrued on that date, and Judge Tenney so held (373a). Indeed, in December, 1963, Phillips made his first of a plethora of applications for the relief sought in this action.

The instant action was commenced by the filing of a complaint in April, 1972, some nine years later.

The applicable limitations period is found in the New York Civil Practice Act ("CPA"), applicable to actions accrued prior to September 1, 1963. Judge Tenney, citing Schwarz v. General Aniline & Film Corp., supra, held:

> "Since the plaintiff's right of reimbursement exists solely by virtue of the indemnification statute, ... the proper statute of limitations is section 48(a) of the CPA, which provides as follows:
>
> 'The following actions must be commenced within six years after the cause of action has accrued:
>
> ....
>
> "1. An action to recover upon a liability created by statute, except a penalty or forfeiture" (372a).

Phillips' brief contains a number of arguments challenging Judge Tenney's holding. As shown below, none of Phillips' contentions has substance.

1. Phillips Cannot Characterize This Action as an Application in Allegheny v. Kirby to Escape Limitations.

At pages 19-21 of his brief, Phillips argues that this action is a motion within the scope of an action already commenced, not an independent

action, and is therefore not subject to the limitations period applicable to "an action to recover upon a liability created by statute."

This is nonsense. The caption, parties and index number of the instant action all are different from Alleghany v. Kirby. The only authority for the maintenance of this action is §65(b) of the General Corporation law, which provides that an application for payment of expenses may be made "...to the supreme court in a separate proceeding." The action was maintainable against IDS in federal court only because of diversity of citizenship between Phillips and IDS, and the District Court functioned herein as though it were the Supreme Court of the State of New York (143a).

It simply cannot rationally be said that this action is an application under the alternative provided by Section 65(a), "...in the action, suit or proceeding brought in this state in which such expenses were incurred."

Phillips took the same position before Judge Brieant in seeking to sustain jurisdiction over defendant Alleghany Corporation, as to which there was not diversity, by urging that the instant action in reality was an application within Alleghany v. Kirby. By opinion and order dated December 11, 1972 (110a-111a), Judge Brieant expressly held that Alleghany v. Kirby "...is a closed case, by entry of a final judgment affirmed on appeal, and by the passage of time" (110a); and that, while the Alleghany v. Kirby Court could have adjudicated Phillips' claimed right to attorneys' fees, it did not do so. Judge Brieant also noted that Phillips had, on October 13, 1964, withdrawn by stipulation the claim he had asserted by motion in Alleghany v. Kirby for the same relief sought herein.

Moreover, IDS was not a party to Alleghany v. Kirby. It is difficult, therefore, to conceive of how a 1972 action brought against IDS can be viewed as a claim against it within an action brought a decade earlier in which IDS was not named and did not appear. The only case cited by Phillips in an effort to overcome this obstacle is of no aid to him. In Austrian v. Williams, supra, the action was brought by trustees in reorganization, and Judge Weinfeld found that, since the plaintiff trustees expressly acted as legal representatives of the corporation, the Court could order indemnification by the corporation of successful defendant-officers. No comparable situation existed in Alleghany v. Kirby. It also must be noted that the application in Austrian v. Williams, supra, was in the action in which the attorneys' fees sought had been incurred and Judge Weinfeld's decision was reversed on the ground that a bankruptcy court had exclusive jurisdiction over the claim.

The instant case clearly is a separate proceeding which Section 65 of the General Corporation Law provides may be brought in the Supreme Court of the State of New York as an alternative to the action in which the expenses were incurred.[19] It is just as clearly an action to recover on a liability

19. Section 65 also provides that, if the action is brought in the Supreme Court as an alternative forum, the application "shall also show reasonable cause for failure to make application" in the action in which the expenses were incurred. This requirement is jurisdictional, and in 1964 a motion was made by Alleghany on subject matter jurisdiction grounds in opposition to Phillips' New York State Supreme Court action for the relief sought herein. By order dated January 8, 1965 (a copy of which is annexed as Exhibit "I" to an affidavit herein by Richard L. Bond, Esq., dated November 7, 1974, Record on Appeal), Phillips' motion against Alleghany was dismissed for want of subject matter jurisdiction.

Subject matter jurisdiction of this Court over this case is based solely on diversity. If the New York Court lacked jurisdiction to hear an action, it would appear axiomatic that federal jurisdiction would be equally absent if predicated solely on diversity. Assuming arguendo Phillips' position that attorneys' fees were recoverable against IDS in Alleghany v. Kirby, it also would appear that the determination of lack of subject matter jurisdiction as to Alleghany would collaterally estop Phillips from claiming against IDS, as to whom the subject matter jurisdiction question would be identical. For this reason, this Court lacks subject matter jurisdiction over those of Phillips' claims based upon Section 64 of the General Corporation Law.

created by statute, and is subject to the six year limitations period of Section 48(2) of the CPA. There is no other appropriate limitations period, and this claim, belatedly brought nine years after it arose, is time barred.

2. The Consulting Fees Phillips Received in Zenn v. Anzalone Was Not a Partial Payment Taking This Action "Out of the Operation of the Statute of Limitations".

Phillips argues at pages 22-24 of his brief that the fee he received in Zenn v. Anzalone, supra, was a part payment that removes this case from the statute of limitations.

The applicable standard is summarized in Sweeney v. Gould Paper Co., 7 A.D.2d 147, 180 N.Y.S.2d 957, 959-60 (4th Dept. 1959).

> "The applicable principle of law has been stated to be that 'the burden is upon the creditor to show that it was a payment of a portion of the admitted debt, and that it was paid to, and accepted by, him as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder. Part payment of a debt is not, of itself, conclusive to take the case out of the statute. In order to have that effect, it must not only appear that the payment was made on account of a debt, but also on account of the debt for which action is brought, and that the payment was made as a part of a larger indebtedness, and under such circumstances as warrant a jury in finding an implied promise to pay the balance.' Crow v. Gleason, 141 N.Y. 489, 493, 36 N.E.497. See also 34 Amer. Jur., Limitation of Actions, §338; Restatement, Contracts, §86, (2)(b); Matter of Fitch, 270 App. Div. 227, 236, 237,58N.Y.S.2d 833, 840, 841."

The payment to Phillips does not begin to comply with that standard. In Zenn v. Anzalone, supra, Phillips was compensated for his activities on plaintiffs' side of certain derivative litigation. In this case he is suing for counsel fees allegedly incurred as a defendant. This argument is specious on its face.

3. Phillips' Claim Accrued When Alleghany v. Kirby Was Determined Finally As To Him, Not When Disposed of on Appeal of the Other Defendants.

Phillips argues at pages 25 through 29 of his brief that his claim did not accrue and limitations did not begin to run until the final Supreme Court determination as to his co-defendants in Alleghany v. Kirby on May 31, 1966, when the Supreme Court vacated a petition for certioriari in Holt v. Kirby, 384 U.S. 28 (April 18, 1966), rehearing denied, 384 U.S. 967 (May 31, 1966). He does concede, however, (Phillips Brief at page 28) that, "no appeal was taken by Alleghany from the judgment of June 5, 1963 insofar as it vindicated Phillips...."

Judge Tenney held that, "[t]he cause of action in this case accrued on June 5, 1963, the date on which final judgment was entered as to Phillips in Alleghany Corp. v. Kirby." (372a-373a).

It is incredible that Phillips now asserts that he had no ripe claim in 1963, after having filed applications in 1963 and 1964 in both the District Court and the State Court for the identical relief sought herein. Phillips filed applications in the District Court on December 12, 1963 and on September 24, 1964. He withdrew his second application on October 13, 1964, and, on the very same day, instituted a proceeding in the Supreme Court of the State of New York seeking the identical relief sought herein. Copies of Phillips' notice of amended petition and notice of petition are annexed as Exhibit "F" to the affidavit of Richard L. Bond, sworn to on November 7, 1974, submitted in this action in opposition to Phillips' motion for summary judgment. (Record on Appeal) In those documents, Phillips very clearly takes the position that his cause of action accrued not later than July 5, 1963.

Indeed, Phillips' argument is self-defeating. If the Alleghany v. Kirby Court would have accepted his application (which it did; Phillips withdrew it voluntarily), he could have maintained it there. If the Alleghany v. Kirby Court would not have accepted his application, that refusal would have been a basis for State Court subject matter jurisdiction under the New York indemnification statute. Phillips never suggested to the State Court that the District Court would decline jurisdiction, despite a specific jurisdictional challenge in the State Court based upon inadequate explanation as to why the application was not made in Alleghany v. Kirby, and Phillips stipulated to that dismissal. A copy of the January 8, 1965 order dismissing the State Court petition is annexed as Exhibit "I" to the affidavit of Richard L. Bond, sworn to on November 7, 1974. (Record on Appeal)

On pages 27 and 28 of his brief, Phillips belatedly and ironically indicates extreme concern for judicial economy, arguing that such considerations dictate that a claim for indemnity would not accrue until a final determination as to all potential recipients of indemnification. The obvious hardship that application of such a concept could raise in a multi-defendant case, assuming entitlement to indemnification, in having to wait years until final disposition of appeals as to other defendants before being indemnified, is a far more compelling argument the other way. In any event, judicial economy did not seem to concern Phillips when he made his three applications for indemnification in 1963 and 1964, and he then was perfectly willing to be indemnified while appeals as to his co-defendants were still pending.

Judge Tenney was correct in holding that Phillips' claim accrued on June 5, 1963, when a final, unappealed judgment was entered in his favor in Alleghany v. Kirby.

4. Phillips' Argument That This Action Was Commenced on August 2, 1965, When He Commenced A State Court Action Against Alleghany For The Relief Sought Herein, Is Specious.

On pages 30-32 of his brief, Phillips asserts that he commenced an action against Alleghany on or about August 2, 1965; Alleghany and IDS are united in interest; and he therefore timely asserted his action against IDS.

IDS does not dispute that the 1965 action was both timely and ripe. That action, however, was dismissed with prejudice by order entered and filed on June 6, 1966 (Sup. Ct., N.Y. Co., Index No. 12788/1965).

Section 205(a) of the New York Civil Practice Law and Rules, provides:

> "New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies, and the cause of action survives, his executor or administrator, may commence a new action upon the same cause of action within six months after the termination."

The instant action was not commenced within six months after termination of the state court action, rather, it was commenced six years later.

5. Phillips Erroneously Argues That, Even If His §64 Claim is Barred By Limitations, Other Common Law or Statutory Claims Are Not.

On pages 33-41 of his brief, Phillips contends that his claims under Minnesota common law (Phillips br. pp. 34-38), Minnesota Statutory Law

(Phillips br. pp.33,39-40), unjust enrichment (Phillips br. p.38), and quantum meruit (Phillips br. p.41) are not barred by limitations.

As shown, supra, pp. 27-41, no such claims exist because there is no New York Common Law right of indemnification; §64 is exclusive and determinative of the law to be applied; the Minnesota statute is not retroactive; and Phillips does not state any claims. It avails Phillips not at all to have complied with the limitations periods applicable to claims he does not have.

6. Phillips' Argument Is Fallacious That Limitations Was Tolled Because IDS Is Not a New York Corporation.

On pages 42-43 of his brief, Phillips asserts that, pursuant to §207 of the New York Civil Practice Law and Rules, limitations was tolled because IDS has "failed to sustain the burden, of proving its residency within the state for a sufficient time to bar the action."

Section 207 by its terms, "... does not apply:

....

"3. while jurisdiction over the person of the defendant can be obtained without personal delivery of the summons to him within the state."

Phillips had no difficulty acquiring jurisdiction over IDS in this action by personal service on the company in Minnesota. He certainly does not dispute that he could always have done so.

Alleghany v. Kirby was predicated on a fraud allegedly committed by, inter alia, Phillips, an IDS director, in connection with the settlement of prior New York litigation (218 F.Supp. at 167-69). This action seeks reimbursement to Phillips, as an IDS director, of litigation expenses allegedly incurred in New York. It is incontestable that "long arm" jurisdiction over IDS pursuant to §302 of the New York Civil Practice Law and Rules always was available.

In such circumstances the New York Court of Appeals held on April 5, 1977, in Yarusso v. Arbotowicz (N.Y.L.J. April 19, 1977):

> "Because there were available authorized methods of service by which personal jurisdiction could have been obtained over the defendant, the Statute of Limitations was not tolled (CPLR 207[3])."

Phillips' argument has no applicability to this case. His claim is barred by limitations, and Judge Tenney properly granted summary judgment to IDS.

POINT III

JUDGE TENNEY CORRECTLY REFUSED TO DISQUALIFY DEFENDANTS' COUNSEL

Phillips has raised as an issue on appeal and alluded in his brief (at pp. 2,3,10,13,18 and 66) to the denial of his motion to disqualify defendants' counsel (345a). Phillips has not briefed the point. Judge Tenney's decision denying this motion (364a-367a) needs no amplification on the law or the facts.

CONCLUSION

For all the foregoing reasons, the orders and judgment appealed from should be affirmed in all respects.

Dated: May 2, 1977

Respectfully submitted,

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER
Attorneys for Appellees

Of Counsel:

Richard L. Bond, Esq.
Daniel S. Greenfeld, Esq.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RANDOLPH PHILLIPS,

Plaintiff-Appellant,

-against-

ALLEGHANY CORPORATION and INVESTORS DIVERSIFIED SERVICES, INC.,

Defendants-Appellees.

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72 Civ. 1544

C/A Docket No. 77-7055

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

[illegible], being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at [illegible], Walton, NY.

That on the 2nd day of May, 1977 at 30 East 72nd Street, New York, New York at [illegible] P.M. deponent served the annexed Appellee's Brief upon Randolph Phillips, the plaintiff pro se in this action by delivering a true copy thereof pursuant to Court Order by placing a copy on the table in the lobby of the above address.

[illegible]

Sworn to before me this
2nd day of May, 1977.

John Alusick
Notary Public

JOHN ALUSICK
Notary Public, State of New York
No. 31 4602133
Qualified in New York County
Commission Expires March 30, 1978